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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

GRACE AZNAVORIAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1A–33A) is not yet reported.

JURISDICTION

This class action for declaratory, injunctive, and monetary relief was initiated pursuant to 42 U.S.C. 405(g), as incorporated in 42 U.S.C. (Supp. V) 1383(c)(3). The district court's order was entered on August 23, 1977 (App. B, *infra*, pp. 34A–38A). The court's judgment was entered on September 6, 1977 (App. C. *infra*, pp. 39A–40A). Notice of appeal

to this Court was filed on September 22, 1977 (App. D, *infra*, p. 41A). On November 15, 1977, Mr. Justice Rehnquist extended the time for docketing the appeal to and including January 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8; *McLucas* v. *DeChamplain*, 421 U.S. 21, 31–32.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 1611(f) of the Social Security Act, as added, 86 Stat. 1468, 42 U.S.C. (Supp. V) 1382(f), provides:

> Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for [Supplemental Security Income benefits] * * * for any month during all of which such individual is outside the United States (and no person shall be considered the eligible spouse of an individual for purposes of this title with respect to any month during all of which such person is outside the United States). For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

Section 1631(c)(3) of the Social Security Act, as added, 86 Stat. 1476, and amended, 42 U.S.C. (Supp. V) 1383(c)(3), provides:

> The final determination of the Secretary after a hearing [on eligibility for or the amount of Supplemental Security Income benefits] * * * shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

Section 205(g) of the Social Security Act, as added, 53 Stat. 1370, and amended, 42 U.S.C. 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. * * *

QUESTIONS PRESENTED

1. Whether Section 1611(f) of the Social Security Act violates the Due Process Clause of the Fifth

Amendment by suspending payment of Supplemental Security Income benefits to otherwise eligible persons who have remained outside the country for at least 30 consecutive days, until such persons return to the United States and stay within the country for 30 consecutive days.

2. Whether a class action may be maintained under Section 205(g) of the Social Security Act.

3. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied Supplemental Security Income benefits under a statutory section held unconstitutional.

STATEMENT

1. The program of Supplemental Security Income ("SSI") for the Aged, Blind, and Disabled, as added, 86 Stat. 1465, and amended, 42 U.S.C. (Supp. V) 1381 *et seq.*, was enacted to replace several pre-existing cooperative federal-state programs for such individuals with a single, uniform system of welfare benefits administered by the Secretary of Health, Education, and Welfare. The new program guarantees a monthly income to persons who meet federally prescribed income levels and other eligibility criteria.

Section 1614(a)(1)(B) of the Social Security Act, 42 U.S.C. (Supp. V) 1382c(a)(1)(B), restricts eligibility for SSI benefits to United States residents. Section 1611(f) of the Act, 42 U.S.C. (Supp. V) 1382(f), further provides that no person shall be considered eligible for SSI benefits "for any month during all of which such individual is outside the United States." The latter section also establishes an eligibility

test for persons who leave the country for an extended period of time: "after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days."

2. The named appellee, Grace Aznavorian, left the United States to go to Guadalajara, Mexico, on July 21, 1974. When she left the United States, she was receiving SSI benefits. While in Mexico, Aznavorian became ill and was unable to return to the United States until September 1, 1974. Pursuant to the 30-day rule of Section 1611(f),[1] appellant, the Secretary of Health, Education, and Welfare, suspended Aznavorian's SSI benefits for the months of August and September 1974 (App. A, *infra,* pp. 2A–3A).

Aznavorian requested reconsideration of the Secretary's decision, and upon such reconsideration, the Secretary reaffirmed it. A hearing was then conducted at Aznavorian's request. The Hearing Examiner found that under Section 1611(f) Aznavorian was ineligible for SSI benefits during August and September. The Appeals Council approved that decision on September 26, 1975. No other administrative remedies

[1] For convenience, the phrase "30-day rule" is used as a shorthand reference to the provisions of Section 1611(f). It should be stressed, however, that the first sentence of that section precludes payment of SSI benefits for any month during all of which an otherwise eligible recipient is outside the United States. Thus, an individual abroad for the entire month of February could not receive SSI benefits for that month, even if he or she returned to the United States before being absent for 30 consecutive days.

remained to be exhausted. Aznavorian then filed this action, on behalf of herself and all similarly situated persons, challenging the constitutionality of the 30-day rule of Section 1611(f). The district court's jurisdiction was invoked under Sections 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 42 U.S.C. (Supp. V) 1383(c)(3). Aznavorian moved for a class certification and for summary judgment (App. A, *infra*, pp. 1A, 3A–4A).

The district court issued an opinion (App. A, *infra*, pp. 1A–33A) and order (App. B, *infra*, pp. 34A–38A) certifying Aznavorian's suit as a class action[2] and enjoining the Secretary from enforcing the 30-day rule of Section 1611(f). The Secretary was ordered to provide notice of the court's decision to the certified class, and to pay benefits to Aznavorian and to all other class members whose benefits were suspended on the basis of the 30-day rule, but who, in fact, remained United States residents. The court subsequently entered judgment in favor of Aznavorian (App. C, *infra*, pp. 39A–40A).

In invalidating the 30-day rule, the district court reasoned that the rule violates the Fifth Amendment's Due Process Clause because it infringes upon SSI re-

[2] The certified class was defined as:

"All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals Council review, based solely on 42 U.S.C. § 1382(f) and regulations promulgated thereunder, from September 26, 197[illegible] until the entry of this Order" (App. B, *infra*, pp. 34A–35A).

cipients' "basic constitutional right to international travel." The court held that the rule bears no "fair and substantial relationship" to the legitimate governmental purpose it seeks to achieve, namely, the restriction of SSI benefits to United States residents (App. A, *infra*, pp. 17A, 19A). The court also concluded that class actions are permissible under Section 205(g), and that sovereign immunity does not bar the payment of retroactive benefits to members of the class (App. A, *infra*, pp. 4A–5A, 28A–30A).

THE QUESTIONS ARE SUBSTANTIAL

1. The district court in this case declined to apply the "rational basis" test traditionally employed by this Court in assessing whether social welfare classifications satisfy the requirements of due process and equal protection. See, *e.g.*, *Califano* v. *Jobst*, No. 76–860, decided November 8, 1977; *Weinberger* v. *Salfi*, 422 U.S. 749, 770. This was error. As this Court said last term in *Mathews* v. *DeCastro*, 429 U.S. 181, 185:

> The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering* v. *Davis*, 301 U.S. 619, 640. In enacting legislation of this kind a

> government does not deny equal protection "merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge* v. *Williams*, 397 U.S. 471, 485.

Rather than the "rational basis" test endorsed by this Court in *Mathews* v. *DeCastro*, *supra*, and other similar cases, the district court here employed a so-called "middle" test, not so exacting as the "strict scrutiny" given by this Court to statutory schemes creating "suspect" classifications or involving "fundamental" rights, see, *e.g.*, *Nyquist* v. *Mauclet*, No. 76–208, decided June 13, 1977; *Shapiro* v. *Thompson*, 394 U.S. 618, but nonetheless more rigorous than the "rational basis" inquiry normally applied in social welfare cases (App. A, *infra*, pp. 15A–16A). The intermediate standard, which the district court incorrectly decided should be applied in this case, would require statutory classifications infringing on the right to international travel to bear a "fair and substantial relationship" to a legitimate governmental purpose (*id.* at 16A). The district court derived this test from opinions of this Court in cases involving alleged gender discrimination. See, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71, 76. Whatever may be the appropriate standard of review in such cases, see *Craig* v. *Boren*, 429 U.S. 190, 212-213 (Stevens, J. concurring), the "rational basis" test remains appropriate here, where the challenged statute involves no gender-based

distinction and no classification based upon an accident of birth or infringing upon a fundamental right.

The right to travel internationally is not a "fundamental right" sufficient to trigger strict scrutiny of Section 1611(f). While this Court has recognized the right to travel interstate as a fundamental right derived directly from the Constitution, *e.g.*, *Shapiro* v. *Thompson*, *supra*, it has not granted equal status to international travel. As Mr. Justice Stewart stated, concurring in *Shapiro* v. *Thompson*, *supra*, 394 U.S. at 642–643:

> "The constitutional right to travel from one State to another * * * has been firmly established and repeatedly recognized." *United States* v. *Guest*, 383 U.S. 745, 757. This constitutional right, which, of course, includes the right of "entering and abiding in any State in the Union," *Truax* v. *Raich*, 239 U.S. 33, 39, is *not* a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards.[1]
>
> [1] By contrast the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. *Kent* v. *Dulles*, 357 U.S. 116, 125; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505–506. As such, this "right," the Court has held, can be regulated within the bounds of due process. *Zemel* v. *Rusk*, 381 U.S. 1.

Thus, the right to travel abroad may be regulated "under conventional due process or equal protection standards." See also *Mathews* v. *Diaz*, 426 U.S. 67, 85.

Moreover, even if the right to travel internationally could properly be characterized as a fundamental right, strict scrutiny would not be required here because the 30-day rule, while perhaps having the incidental effect of deterring SSI recipients from traveling abroad for more than 30 days, does not directly inhibit or regulate such travel and, indeed, is neutral in its effect on foreign trips of under 30 days. In such circumstances, where the challenged statute affects an allegedly fundamental right only remotely, the rational basis test is appropriate. Cf. *Califano* v. *Jobst, supra* (rational basis test applicable to Social Security classification scheme despite scheme's incidental burden on recipient's right to marry).

The 30-day rule is rationally related to the concededly legitimate congressional purpose of withholding SSI benefits from persons who do not live in the United States. See App. A, *infra,* p. 16A. The 30-day rule serves as an easily administrable demarcation between those SSI recipients who leave the country indefinitely and are not entitled to benefits, and those who leave only temporarily. Without a simple test, such as the 30-day rule, the Social Security Administration would be faced with the formidable task of determining whether each SSI recipient who leaves the United States is abandoning his residence here or is only leaving for a temporary visit or vacation. Congress could reasonably presume that most persons who leave the country temporarily, intending to remain United States residents, will return within 30 days—especially when those persons, like the class members

in this case, are not wealthy and receive most or all of their income from social welfare programs.

Also rationally related to the legitimate purpose of ensuring that SSI recipients are United States residents is the portion of Section 1611(f) which prohibits restoration of SSI benefits to an otherwise eligible individual who has travelled outside the United States for 30 or more consecutive days until that individual has returned to the United States and remained here for at least 30 consecutive days. This provision avoids the anomalous situation in which an otherwise eligible individual could stay outside the United States for extended periods of time and nevertheless receive an SSI check immediately upon each return to the country. The statutory scheme offers a simple means by which a continuing intention to remain a United States resident may be evidenced.

To be sure, the 30-day rule does not provide a perfect method of preventing non-residents from receiving SSI benefits. Nor does it necessarily comprise the best method available for accomplishing that objective.[3] See App. A, *infra,* pp. 18A–19A. However, in the area of social welfare, a statutory classification "does not offend the Constitution simply because the classification 'is not made with mathematical nicety

[3] Section 1611(f) serves several subsidiary purposes. For example, SSI benefits are intended to help the needy within the United States, and accordingly are calculated on the basis of the United States' cost of living. The rule suspending benefits after a recipient has been absent from the country for 30 consecutive days prevents recipients from obtaining "windfall" benefits while taking extended trips to countries where the cost of living is less than it is in the United States.

or because in practice it results in some inequality.'" *Dandridge* v. *Williams*, 397 U.S. 471, 485. Administratively convenient presumptions, such as the 30-day rule, are permissible unless they bear no relationship to reality and are utterly irrational. *Weinberger* v. *Salfi*, 422 U.S. 749, 773–780; see also *Califano* v. *Jobst*, *supra*; *Mathews* v. *DeCastro*, *supra*; *Mathews* v. *Diaz*, *supra*. That is not the case here.[4]

2. Aside from the merits, the district court erred in certifying this lawsuit as a class action. The only possible jurisdictional basis for this lawsuit is Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), as incorporated in Section 1631(c)(3) of the Act, 42 U.S.C. (Supp. V) 1383(c)(3). See *Weinberger* v. *Salfi*, *supra*. As the government has previously argued to this Court, *Norton* v. *Mathews*, No. 74–6212, Section 205(g) manifests a congressional intention to bar class actions.

The statute authorizes the initiation of suit in federal district court only for the purpose of obtaining judicial review of a "final decision of the Secretary made after a hearing to which [the plaintiff] was a party * * *." This language reveals a congressional design to bar class suits and to permit adjudication of individual claims only. Likewise, Section 205(g)

[4] Pending on this Court's appellate docket are two cases from the District of Puerto Rico, *Califano* v. *Colon*, No. 77–126, and *Califano* v. *Torres*, No. 77–88, which invalidated Sections 1611(f) and 1614(e) of the Social Security Act as applied to SSI recipients who move from one of the fifty states or the District of Columbia to Puerto Rico. Section 1614(e), 42 U.S.C. (Supp. V) 1382c(e), defines "United States" as the 50 states and the District of Columbia. Thus, when an SSI recipient moves to Puerto Rico or travels there for over 30 days, his benefits are suspended pursuant to Section 1611(f). The *Colon* and *Torres* courts, employing a "strict scrutiny" analysis, held that this statutory scheme violates SSI recipients' right to travel. The Court's attention is called to *Colon* and *Torres* not because resolution of the issue there in dispute would be dispositive of this case, but only because the statutory provision challenged here is also involved in those earlier cases.

does not empower the district court to grant injunctive relief beyond the particular applicants before the court. *Norton* brief at 12–13, 19–25;[5] *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 763 n. 8; *Jablon* v. *Secretary of Health, Education, and Welfare*, 399 F. Supp. 118, 121–124 (D. Md.), summarily affirmed *sub nom. Jablon* v. *Califano*, 430 U.S. 924. Thus, the district court in this case should have confined its relief, if any relief were appropriate, to the particular plaintiff before it, *i.e.*, Aznavorian.

3. Finally, the district court should not have awarded retroactive monetary relief to Aznavorian and, potentially, to members of the certified class. Congress has not waived the government's sovereign immunity for damage suits based on the unconstitutionality of provisions of the Social Security Act. Section 205(g) does not constitute such a waiver; it merely creates a basis for federal jurisdiction. See, *e.g.*, *DeLao* v. *Califano*, 560 F. 2d 1384, 1389–1391 (C.A. 9); *Tatum* v. *Mathews*, 541 F. 2d 161, 165–166 (C.A. 6); *Johnson* v. *Mathews*, 539 F. 2d 1111, 1122–1125 (C.A. 8).

Nor can the substantive provisions of the Social Security Act "'fairly be interpreted as mandating

[5] A copy of the *Norton* brief is being furnished to appellees' counsel. The Court decided that case without reaching the jurisdictional issues raised by the Secretary. 427 U.S. 524.

compensation by the Federal Government for the damage sustained.'" *United States* v. *Testan*, 424 U.S. 392, 400. Indeed, the purpose of this suit was to invalidate the statute to the extent that it suspended appellees' entitlement to SSI benefits. Thus, retroactive monetary relief, which must be viewed as an assessment of money damages against the government, see *Edelman* v. *Jordan*, 415 U.S. 651, is barred by the sovereign immunity doctrine. See *United States* v. *Testan, supra*. See also Brief for Appellant, No. 75–1704, 22–25, *Alexander* v. *Fioto*, 430 U.S. 634.[6] The courts of appeals, relying on *Testan*, have so held in several social security cases. See *DeLao, supra; Tatum, supra; Johnson, supra*.[7]

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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[6] Since the Court in *Fioto* unanimously held that the statutory scheme under which appellee was denied retirement pay for his National Guard service was constitutionally unobjectionable, the Court had no occasion to reach the government's sovereign immunity argument.

[7] The Due Process Clause of the Fifth Amendment does not by itself waive sovereign immunity. *Duarte* v. *United States*, 532 F. 2d 850, 852 (C.A. 2).

APPENDIX A

United States District Court,
Southern District of California

Civil No. 75–1103–GT

[filed August 12, 1977]

OPINION

GRACE AZNAVORIAN, ET AL., PLAINTIFF
v.
JOSEPH A. CALIFANO, JR., ETC., DEFENDANT

I. INTRODUCTION

Pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3),[1] plaintiff seeks review of a final decision, dated September 26, 1975, of the Secretary of Health, Education and Welfare, terminating her Supplemental Security Income benefits for the months of August and September, 1974, pursuant to Social Security Act section 1611(f), 42 U.S.C. § 1382(f). Plaintiff Aznavorian sought to have this action maintained as a class action pursuant to Rule 23 (a) and (b)(2), Federal Rules of Civil Procedure. No facts are in dispute and plaintiff's sole contention is that Section 1611(f) is unconstitutional as being violative of her due process and equal protection rights because it penalized her

[1] While plaintiff's Complaint also sought to invoke additional jurisdiction pursuant to 28 U.S.C. § 1361, injunctive relief, and a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284, plaintiff, by way of stipulation, withdrew without prejudice these additional allegations of jurisdiction.

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right of international travel in violation of the Fifth Amendment to the United States Constitution. Section 1611(f) provides as follows:

> Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for purposes of this title for any month during all of which such individual is outside the United States * * *
>
> For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

The statute creates two classes of equally needy Supplemental Security Income (SSI) recipients, indistinguishable from each other, except that one class has recently traveled outside the United States for more than one month. Because section 1382(f) *conclusively* presumes that traveling class members have abandoned their residence in the United States, the statute terminates their SSI benefits during any calendar month they are outside the country and for the first thirty days following their return.

II. Facts

The uncontested facts in this case are as follows: On July 21, 1974, plaintiff Aznavorian, a United States citizen, resident of San Diego County, and an eligible recipient of Supplemental Security Income benefits, left the United States for health reasons and proceeded to Guadalajara, Mexico, where she sought medical attention. At the time of her departure, she did not intend to remain outside of the United States for more than one month.

While in Mexico, plaintiff Aznavorian became ill and she was unable to return to the United States until September 1, 1974. No evidence indicates that she ever intended to abandon her residence in the United States. As a result of this brief departure, defendant Secretary terminated plaintiff from the Supplemental Security Income program and she was found to be ineligible for any benefits during the months of August and September, 1974, pursuant to Section 1611(f) of the Social Security Act.

There are two parties seeking to intervene. Intervenor Anna Tolstick is an 80-year-old widow who has been residing in New York City, New York, since 1921. Intervenor Tolstick is a recipient of Supplemental Security Income who wishes to visit a sister in Ukraine, U.S.S.R., once more before she dies. Ms. Tolstick would like to travel outside the United States for two months. However, defendant Secretary has advised her by letter that she would automatically lose her SSI benefits during the planned trip and for one month after she returned pursuant to Section 1611(f) of the Act. For that reason, she has not taken her trip and has remained in the United States.

Intervenor Betsabe Rivas, an 80-year-old widow residing in New York City, New York, is in the almost identical situation as Intervenor Tolstick. She is an SSI recipient who wishes to make a last visit to her family in Cali, Colombia. She also received a letter from defendant Secretary indicating that her benefits would be terminated pursuant to Section 1611(f) if she undertook her planned travel abroad. For that reason, she has remained in the United States.

The Court has before it defendant Secretary's Motion for Summary Judgment, plaintiffs' Motion for

Class Certification, and a Motion to Intervene as Plaintiffs brought by Mrs. Tolstick and Mrs. Rivas.

III. Motions for Class Certification and for Clarification

Plaintiff Aznavorian has filed this action on behalf of herself and all similarly situated persons pursuant to Rule 23 (a) and (b)(2), Federal Rules of Civil Procedure. She defines her class as consisting of:

> all individuals eligible for Supplemental Security Income who had such SSI denied, terminated or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals Council review, based solely on 42 U.S.C. § 1382(f), on September 26, 1975, or at any time thereafter.

As defined, all class members are properly before this Court pursuant to 42 U.S.C. § 405(g) as they have all received "final decision" from defendant Secretary.[2]

Defendant Secretary contends class relief is not available under section 405(g). The Supreme Court in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), did not foreclose, but to the contrary, implied that class relief is available to a court exercising section 405(g) jurisdiction. *Salfi* denied class relief not because anything

[2] The relevant section of the Act, Section 205(g), 42 U.S.C. § 405(g), reads as follows: "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision * * *"

in section 405(g) precludes this form of relief, but because the class was improperly formed in the specific setting of that case.[3] 422 U.S. at 764. The Court in *Salfi* recognized that where the sole challenge is to the constitutionality of a statutory requirement, something over which the defendant Secretary has no jurisdiction, further exhaustion beyond an initial determination "would not merely be futile * * * but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Weinberger* v. *Salfi, supra,* 422 U.S. at 766.

In *Mathews* v. *Eldridge,* 424 U.S. 319, 328 (1976), the Supreme Court held:

> Salfi identified several conditions which must be satisfied in order to obtain judicial review under § 405(g). Of these, the requirement that there be a final decision by the Secretary after a hearing was regarded as "central to the requisite, grant of subject-matter jurisdiction * * *." 422 U.S., at 764[9] (Footnote omitted). Implicit in *Salfi,* however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision

[3] Class relief was denied in *Salfi* because unnamed members of the class had not satisfied one of the three statutory requirements for judicial review of an adverse decision by the Secretary. The class as defined in the instant case properly accounts for the exhaustion concerns embodied in § 405(g) and discussed in *Salfi*.

> by the Secretary is clearly required by the statute.

The "waivable [jurisdictional] element", that a "final decision" be rendered to satisfy the statutory exhaustion requirement, in some cases will not be left to the "deference [of] the agency's judgment * * *" *Id.*, at 330. The plaintiff in *Eldridge* conceded that he did not exhaust the administrative procedures provided by the Secretary. *Id.*, at 330.

The fact that full exhaustion of administrative remedies is not required when the plaintiffs challenge denials and/or terminations solely on alleged statutory or regulatory constitutional infirmities was again recognized in *Mathews* v. *Diaz,* 426 U.S. 67 (1976), and *Norton* v. *Mathews,* 427 U.S. 524 (1976). The Court noted in *Diaz*:

> None of the appellees completely exhausted available avenues for administrative review. Nevertheless, the Secretary acknowledged that the applications of Diaz and Clara raised no disputed issues of fact and therefore the interlocutory denials of their applications should be treated as final for the purpose of this litigation. *Id.,* at 72.

Cf., Weinberger v. *Wiesenfeld,* 420 U.S. 636, 641 n. 8 (1975). The decisions in *Jimenez* v. *Weinberger,* 523 F. 2d 689, 695–696, n. 10 (7th Cir. 1975), *cert. denied,* 417 U.S. 628 (1976), and *Tatum* v. *Mathews,* 541 F. 2d 161, 163–164 (6th Cir. 1976), interpret the "final decision" requirement consistent with *Eldridge* and *Salfi* as requiring no more than in initial adverse decision. *Cf., Ellison* v. *Califano,* 546 F. 2d 1162, 1164 (5th Cir. 1977). The plaintiff class herein is defined as including only those persons who have received an explicit decision denying, interrupting or terminating their

benefits based solely on the terms of the challenged statute.[4]

A. THE REQUIREMENTS OF RULE 23(a) ARE SATISFIED

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Defendant Secretary's responses to plaintiff's interrogatories have provided information clearly resolving the "numerosity" issue in favor of class certification. Defendant stated that he did not have available the precise total number of class members whose SSI benefits were denied, interrupted or suspended solely pursuant to § 1611(f). He did submit an approximation indicating that between 4,823 and 9,195 persons were deprived of their SSI benefits per month from February to October, 1976. Numerosity of the class makes joinder of all members impracticable.

There are questions of law or fact common to the class satisfying Rule 23(a)(2).. The primary issue presented by plaintiff's challenge herein is whether Section 1611(f) violates the plaintiff's Fifth Amendment right to travel. The challenged statute denies benefits to plaintiff and her class on a common factual basis—their absence from the United States for more than 30 consecutive days and/or one calendar month. The requirements of Rule 23(a)(2), requiring common question of law or fact, are therefore satisfied. *Jimenez* v. *Weinberger, supra,* 523 F. 2d at 699.

The requirement of Rule 23(a)(3), that the claims of the named plaintiff be typical of the claims of the

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[4] Defendant Secretary additionally concedes that "[i]f, indeed class actions are possible under the Social Security Act * * * then defendant has no objection to the definition of the proposed class." [Def.'s Br. in Oppos. to Plaintiff's Motion for Class Action Certification, at p. 1.]

class, are likewise satisfied. *Gonzales* v. *Cassidy,* 474 F. 2d 67, 71 n. 7 (5th Cir. 1973). All members of the class will benefit by the suit and the requirement of typicality has been met. *Eisen* v. *Carlisle and Jacquelin,* 391, F. 2d 555 (2d Cir. 1968), *aff'd in part,* 417 U.S. 156 (1974).

Finally, the fourth requirement of Rule 23(a), that the "representative parties will fairly and adequately protect the interests of the class," is satisfied. Plaintiff's counsel are employed by various legal services programs and are experienced in Social Security and Supplemental Security litigation and federal court class actions. The plaintiff does not have interests antagonistic to the class since they share identical interests. *See, Wetzel* v. *Liberty Mutual Insurance Co.,* 508 F. 2d 239, 247 (3rd Cir.), *cert. denied,* 421 U.S. 1011 (1975).

B. THE REQUIREMENTS OF RULE 23(b) ARE SATISFIED

The class further satisfies the requirements of Rule 23(b)(2), in that defendant Secretary applies the challenged statute in a similar manner to the entire class. Rule 23(b)(2) is applicable when the party opposing the class has acted or refused to act on grounds generally applicable to the class.

The United States Court of Appeals for the Ninth Circuit in a recent decision provided additional guidance on the question whether notice must be given to identifiable class members in a Rule 23(b)(2) class action. *Souza* v. *Scalone,* No. 74-3485 (9th Cir. January 3, 1977).[5] The court in *Souza* indicated that:

[5] The Court in *Souza* set forth the criteria, originally adopted in *Elliott* v. *Weinberger,* F. 2d (9th Cir. 1975), *vacated on other grounds*, 425 U.S. 987 (1976), for determining the circumstances under which notice to class members is necessary to assure conformity to the requirements of due process.

> Only when the purposes in providing class members an opportunity [1] to signify whether representation by named plaintiffs is fair and adequate or [2] to intervene to present additional claims or [3] otherwise come into the action to, for example, submit views as amici curiae, are in need of being served, does due process require some sort of notice to absent members of a [Rule 23] (b)(2) class.

The *Elliott* Court determined that none of these "special circumstances" existed in challenging the constitutionality of Social Security recoupment procedures. The Ninth Circuit therefore affirmed the certification of a nationwide class without providing prejudgment notice. The same is true here.

The plaintiffs here are represented by skilled and experienced counsel who are familiar with Social Security class actions. There is no significant factual dispute and the only issues raised are constitutional. Additional claims are not needed; they would only complicate and protract this matter. The plaintiff is typical of the class and additional plaintiffs are unnecessary. Lastly, the constitutional issues have been thoroughly briefed and amici curiae argument is not needed. For the foregoing reasons, prejudgment notice to absent class members is not required. The postjudgment notice to absent class members is not required. The postjudgment notice directed in the class relief order adequately insures that all absent class members will receive complete protection of their claims for SSI benefits.

THE CLASS IS NOT OVERBROAD

In defendant's response to plaintiff's proposed order granting class relief, the defendant for the first time raises objection to the venue for a nationwide class. This action is appropriately a matter calling for certification of a nationwide class. More importantly, objections to improper venue must be raised in the first responsive pleading, or they are waived. Federal Rules of Civil Procedure 8(c), 12(b), 12(h)(1). The venue provision of § 405(g) is no exception; it can be waived if not timely raised. *Weinberger* v. *Salfi, supra.* 422 U.S. at 764

The complaint was filed on November 25, 1975. The Secretary answered on February 20, 1976, without raising any venue objections. There were a number of subsequent motions and hearings prior to the Secretary contending for the first time in his March 31, 1977 response that venue is improper for any class member outside this judicial district. He has waited too long to raise this issue; his objection has been waived.

IV. Motion to Intervene

The applications of Intervenors Tolstick and Rivas are hereby denied, without prejudice, because they have not presented a "claim" to the Secretary, following loss of their benefits. This is a non-waivable requirement. *Mathews* v. *Eldridge, supra,* 424 U.S. at 328. Intervenors, both SSI recipients, communicated in writing with defendant Secretary concerning their need for continued receipt of their SSI benefits while traveling abroad for two months. They received written responses indicating that if they took their planned trips their SSI benefits would be suspended or terminated due to application of section 1611(f).

This does not constitute a "claim." They have not yet been injured by application of section 1611(f).

Intervenors renewed their motion for intervention alleging that they had already suffered constitutional injuries because of defendant's threatened enforcement of § 1611(f) and that their claims presented actual controversies appropriate for declaratory judgment. They alleged jurisdiction upon 5 U.S.C. §§ 701–706 (Administrative Procedure Act), 28 U.S.C. §§ 1343(4) or 1331, in addition to 42 U.S.C. § 405(g). In their renewed applications intervenors alleged that they had not taken their planned trips due to the defendant's threatened termination of their SSI benefits. They further allege that defendant Secretary's stipulation, that intervenors have no available administrative remedies prior to an actual suspension of benefits pursuant to section 1611(f), coupled with the earlier written responses of defendant as to the threatened loss of benefits, constitutes a "final decision" for § 405(g) jurisdiction.

The position of intervenors has not changed since their initial applications for intervention. They have not yet submitted a "claim," nor have they been injured by application of section 1611(f), and this court therefore lacks subject-matter jurisdiction.

V. Motion for Summary Judgment and Reconsideration

It is time to turn to the merits of this action. The effect of Section 1611(f) is to create a conclusive presumption of abandonment of United States residency upon any departure exceeding one calendar month. The section further precludes an applicant or recipient from restablishing residency until he has been

back in the United States for 30 consecutive days following a trip outside of the United States for 30 consecutive days.[6] United States residency is a requirement for SSI eligibility.[7]

By the very terms of section 1611(f), a presumption of abandonment of residency is created for any departure from the United States which last one calendar month or longer. A person traveling outside of the United States for the prescribed period of time loses SSI benefits regardless of the intent of the traveler to maintain a United States residence, the reasons for remaining outside the country for more than the prescribed period, or existence of evidence showing that United States residency has not in fact been abandoned.

The fundamental attack directed at section 1611(f) by the plaintiff concerns the constitutional right to travel. The first issue to be confronted is the test to be applied in assessing the constitutionality of the statute.

The right to travel beyond the frontiers of the United States is a basic constitutional right. *Kent* v. *Dulles,* 357 U.S. 116, 125 (1958); *Aptheker* v. *Sec. of*

[6] Plaintiff initially argued that the second portion of section 1611(f) was only triggered after a recipient had been outside of the United States for one calendar month. The court finds that the 30-day residency requirement contained in the second portion of section 1611(f) applies to applicants and recipients, and operates independently of the abandonment of residency provision contained in the first portion of section 1611(f). However, the issue here concerns those already on SSI and whether there is a sufficient reason to have them cut off from those benefits upon travel abroad that exceeds one calendar month.

[7] 42 U.S.C. §§ 1382(a)(1), (a)(2); § 1382c(a)(1)(B).

State, 378 U.S. 500, 514 (1964); *Zemel* v. *Rusk,* 381 U.S. 1, 14 (1965); *United States* v. *Davis,* 482 F. 2d 893, 912 (9th Cir. 1973). Defendant Secretary urges that "[t]he proper standard of review in a case involving the right to travel abroad is the 'rational basis test.'" Defendant argues that the "rational basis test" has traditionally been applied to legislation in the area of social welfare. *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Richardson* v. *Belcher,* 408 U.S. 78 (1971); *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). However, these cases are not controlling because § 1611(f) implicates constitutionally protected conduct and must, therefore, be measured against a test more exacting than the "rational basis" standard urged by defendant.

While plaintiff Aznavorian was not deterred from traveling, she was, by the later loss of the funds by which she obtains the basic necessities of life, penalized for exercising her constitutional right to international travel. *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 259 (1974). The Supreme Court has specifically noted that judicial scrutiny is triggered by a penalizing of the right to travel, regardless of whether or not travel was actually deterred. *Dunn* v. *Blumstein,* 405 U.S. 330, 339–340 (1972). SSI benefits provide the means for purchasing the "basic necessities of life," and, as noted in *Memorial Hospital* v. *Maricopa County, supra,* 415 U.S. at 259, "[i]n *Shapiro,* the Court found denial of the basic 'necessities of life' to be a penalty."

Right to travel *interstate* has been recognized as a fundamental right necessitating application of the "strict scrutiny" test. *Shapiro* v. *Thompson,* 394 U.S.

618 (1969). Defendant contends that the right to travel abroad has not been given the same degree of protection and directs this court's attention to the concurring opinion of Justice Stewart in *Shapiro* v. *Thompson, supra* at 643 n. 1:

> By contrast, the "right" of international travel has been considered to be more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. *Kent* v. *Dulles,* 357 U.S. 116, 126; *Aptheker* v. *Secretary of State,* 378 U.S. 500, 505–506. As such, this "right," the Court has held, can be regulated within the bounds of due process. *Zemel* v. *Rusk,* 381 U.S. 1.

The Supreme Court has not clearly spoken regarding the degree of protection to be afforded international travel. Lower court decisions have indicated that the right to travel abroad is a fundamental right. *United States* v. *Davis, supra,* 482 F. 2d at 912; *Gautier Torres* v. *Mathews,* 426 F. Supp. 1106 (D. Puerto Rico, 1977). The *Gautier Torres* case was decided by a three-judge panel and held that § 1611(f) [the statute involved in the instant case] was unconstitutional because it impaired the fundamental right to travel internationally. This Court declines to follow the same path as the Court in the *Gautier Torres* case, although the end result is essentially the same.

In *Kent* v. *Dulles, supra,* 357 U.S. at 126, the Court stated:

> Freedom of movement across frontiers in either direction and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.

Personal rights cannot simply be recognized as "fundamental" or not "fundamental." It is not that simple; obviously some rights are more significant than others. The right to travel abroad is certainly a very important right. However, it should not be placed on equal footing with the right to travel interstate. International travel has traditionally been subject to more controls than has interstate travel. For example, a passport must normally be obtained for travel to most countries and in some instances the government has legitimately imposed complete restriction on travel to certain countries for reasons of national security. On the other hand, the Supreme Court has certainly implied that infringement on this travel right is deserving of much closer scrutiny than that given under the "rational basis" test. *Kent* v. *Dulles, supra; Aptheker* v. *Sec. of State, supra; Zemel* v. *Rusk, supra.*

The protection afforded various rights is a matter of degree. As noted above, the right to international travel is a basic constitutional right and the interest of the government in restricting such travel must be "legitimate and substantial" and cannot be pursued by means that broadly stifle fundamental personal liberties when the ends can be more narrowly achieved. *Aptheker* v. *Sec. of State, supra,* 378 U.S. at 508. The Supreme Court has utilized a middle ground or middle standard, in dealing with classifications premised on sex. *Reed* v. *Reed,* 404 U.S. 71 (1971). The standard adopted in the *Reed* case is appropriate in the instant case where a basic right is involved, but it is not within the class of rights given full "strict scrutiny"

protection. The statute must bear a fair and substantial relationship in fact to the governmental purposes that it seeks to achieve. *Reed* v. *Reed,* supra, at 76.[8]

The purpose of the statute here challenged is, according to defendant Secretary, to avoid payment of SSI benefits to nonresidents of the Country. Plaintiff concedes, and the Court agrees, that this is a legitimate purpose. *Shapiro* v. *Thompson, supra; Memorial Hospital* v. *Maricopa County, supra.* However, while the objective of limiting SSI payments to bona fide residents may be laudable, the Court finds

[8] The court recognizes that the Supreme Court in *Reed* professed to only be applying a rational basis review. But subsequent Supreme Court cases applying *Reed* have borne out the view of legal commentators that *Reed* established a "middle ground" standard of review for sex classifications falling somewhere between rational basis and strict scrutiny. *Frontiero* v. *Richardson,* 411 U.S. 677, 690 (1973); *Stanton* v. *Stanton,* 421 U.S. 7 (1975); *Craig* v. *Boren,* 97 S. Ct. 451 (1976). *See geenrally* Gunther, The Supreme Court, 1971 Term, Forward In Search of Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection, 86 Har. L. Rev. (1972).

The choice of the *Reed* standard finds support in the *Aptheker* right to international travel case, in which the Supreme Court appears to have foreshadowed the adoption of a middle ground test when it quoted from the criteria enunciated in *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960):

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

The *Aptheker* court went on to state:

> At the same time the Constitution requires that the powers of government "must be so exercised as not, in attaining a permissible end, unduly to infringe" a constitutionally protected freedom. *Cantwell* v. *Connecticut, supra,* at 304. *Id.,* at 509.

that the means adopted to effectuate the end do not bear a fair and substantial relationship to the purpose sought to be achieved. As noted by the Supreme Court in *Aptheker,* even if the government purpose is both legitimate and substantial, that purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when * * * less drastic means [are available] for achieving the same basic purpose." *Aptheker* v. *Sec. of State, supra,* 378 U.S. at 508.

Defendant Secretary has alleged that section 1611(f) prevents the fraudulent receipt of SSI by nonresidents by establishing an administratively convenient, objective test of residency. Congress has a valid interest in preserving the limited fiscal resources available for SSI payments. However, administrative convenience alone is not a substantial enough reason to justify penalizing the basic constitutional right to international travel. *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975). The Supreme Court in *Memorial Hospital* v. *Maricopa County, supra,* 415 U.S. at 267, rejected the government's argument that the waiting period was a "convenient rule of thumb to determine bona fide residence." *See also Reed* v. *Reed, supra,* 404 U.S. at 76; *Shapiro* v. *Thompson, supra,* 394 U.S. at 636.

Despite its penalizing effect, section 1611(f) does not bear a fair and substantial relationship to its purpose of preventing fraud. As noted by the Supreme Court in *Maricopa County,* in response to a government claim that the durational residency requirement prevented fraud, the dishonest applicant/recipient could just as easily swear to having fulfilled the requirement as not. 415 U.S. at 268. Defendant here claims, maybe correctly, that certain SSI recipients/applicants will not be honest about their residency

and, therefore, an objective test is required. Without some bright-line rule, the defendant argues, a hearing on the facts would have to be made in each case. But a recipient/applicant could just as easily be dishonest in providing information required to apply this objective test. The fraud-prevention aspect of section 1611 (f) can further be defeated by the recipient simply entering the United States for one day during the calendar month or thirty consecutive day period that would otherwise trigger a suspension of benefits. 20 C.F.R. 416.325.

A legitimate government purpose cannot be pursued by means that broadly stifle the right to travel internationally when there are effective and less drastic means available. The means must be considered in light of the purpose of the SSI program. The purpose is to provide benefits to the old-age, the blind, and the totally disabled based on a sympathetic understanding of the needs of the helpless. *Cardinale* v. *Mathews,* 399 F. Supp. 1163, 1164 (D.D.C. 1975).

Less drastic means are available and are employed to determine fraudulent claims for benefits. Other sections within the Social Security Act have been established for the specific purpose of preventing fraud. *See, e.g.,* 42 U.S.C. § 1383(e)(1)(B) (requiring verification of information received from an applicant/recipient); 42 U.S.C. § 1382(e)(3) (requiring the monitoring of all recipients); 42 U.S.C. § 1383 (b) (requiring repayment to the program of overpayments received by recipients); and, 42 U.S.C. § 1383a (delineating penalties for various fraudulent acts leading to the wrongful receipt of benefits.) "[L]ess drastic means are available, and are employed," to minimize the hazard of fraud. *Shapiro* v. *Thompson, supra,* 394

U.S. at 637; *Aptheker* v. *Secretary of State, supra,* 378 U.S. at 508.

Section 1611(f) does not bear a fair and substantial relationship to its avowed purpose of limiting SSI payments to bona fide residents of the United States. The requirement of residency, separately established by 42 U.S.C. § 1382c(a)(1)(B), *supra,* and the conclusive loss of residency and subsequent 30-day waiting period required by section 1611(f) to regain residency, are "distinct and independent prerequisites for assistance." *Shapiro* v. *Thompson, supra,* 394 U.S. at 636. Defendant concedes that he maintains no statistics to substantiate his assertion that the one month or 30-day travel period is substantially related in fact to abandonment or establishment of residency.

Utilizing objective factors, such as continued ownership or rental of a home, continued employment in the United States membership in organizations, and the purpose for the trip, would be far more effective in avoiding sham residency claims than relying solely on the recipient's or applicant's assertions concerning the lengths of time spent in or out of the country. Defendant already employs such a multi-factor residence test in making initial determinations of residency in processing SSI applications.[9] In short, "[L]ess drastic means are available, and are [or can be] employed," to minimize fraud and ensure that SSI is not paid to nonresidents of the United States. *Shapiro* v. *Thompson, supra,* 394 U.S. at 637; *Aptheker* v. *Sec. of State,* 378 U.S. at 508.

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[9] As noted in the SSI Claims Manual, Section A2101, "a person becomes a resident when he arrives in one of the fifty states * * * with the intent to establish his home there * * * the intent may be inferred from such actions as arranging for rental or purchase of a dwelling * * *"

Defendant concedes that section 1611(f) creates two classes of needy persons, indistinguishable from each other except that one has remained in the United States, while the other has been outside of the United States for one month. Recipients of SSI benefits are forced to abandon a constitutional right to travel that non-recipients retain without penalty. As already noted, the Court finds that section 1611(f) does not bear a fair and substantial relationship to the governmental purpose of preventing SSI payments to non-residents. The blanket and conclusive exclusion of recipients and applicants who travel for 30 days or more from the SSI program is not fairly and substantially related to the prevention of false residency claims. The section, therefore, violates the equal protection rights of those SSI recipients who are penalized by its terms. *Jimenez* v. *Weinberger*, 417 U.S. 628, 636 (1974).[10]

For all of the above reasons the Court finds that Section 1611(f) imposes an unconstitutional infringement on plaintiff's right to travel outside of the United States. The Court finds that denial of SSI benefits to plaintiff during the time that she was outside of the United States and during the first 30 consecutive days following her return violated her Fifth Amendment right to equal protection and due process of law.[11]

[10] It is conceded by defendant that the Equal Protection clause of the Fourteenth Amendment finds similar life in the Fifth Amendment due process guarantee. *Bolling* v. *Sharp*, 347 U.S. 497 (1954).

[11] Defendant admits that "Section 1611(f) of the Act challenged by plaintiff does, indeed, create an irrebuttable presumption." Plaintiff Aznavorian argues that Section 1611(f) "indiscriminately excludes plainly relevant considerations" (*Aptheker* v. *Secretary of State*, *supra*, 378 U.S. at 514) and thereby creates an inaccurate conclusive presumption of non-residency amounting to a violation of her due process rights under the Fifth Amendment. Having found that section 1611(f) is unconstitutional as an undue infringement on the international right to travel and that it violates the equal protection rights of that category of SSI recipients affected by its terms, the Court finds it unnecessary to reach the conclusive presumption argument presented by plaintiff.

Defendants Motion for Reconsideration

Following oral rulings and comments of this Court, defendant Secretary filed a Motion for Reconsideration in which he largely reiterated his prior arguments that the proper test for constitutionality of section 1611(f) is the "rational basis" test. *Sosna* v. *Iowa*, 419 U.S. 397 (1975). Defendant also argues that an SSI recipient abroad may encounter circumstances that change his eligibility status.[12] Finally defendant argues that the 30-day residency requirement activated upon a person's return to the United States "allows a stabilization period for income and resources following an extended time out of the United States." [Supplemental Memorandum in Support of Motion for Summary Judgment, at p. 12.]

Sosna distinguished *Shapiro* v. *Thompson*, *supra*, and *Memorial Hospital* v. *Maricopa County*, *supra*, stating that, unlike in *Sosna*, there "the durational residency requirements * * * were justified on the basis of budgetary or recordkeeping considerations which were held insufficient to outweigh the constitutional

[12] Examples of such changes in eligibility include: (1) Recipient living in the house of another and receiving in kind income in the form of support and maintenance results in an automatic one-third reduction in monthly benefits (42 U.S.C. § 1382(a)(2)(A)); (2) Gifts received by the recipient may effect eligibility (70 C.F.R. §§ 416.1136 and 416.1157); (3) Certain forms of income in specified amounts effect eligibility (42 U.S.C. § 1382a).

claims of the individuals." *Sosna* v. *Iowa, supra,* 419 U.S. at 406. Furthermore, in *Sosna* the Court found that important considerations, other than "administrative convenience", allowed the state to require that a person have a modicum of attachment to the State. *Id.,* at 406–407. Finally, the challenged statute in *Sosna* did not act as a penalty. It merely delayed the exercise of interests in marriage/divorce. *Sosna* therefore does not provide authority for the application of the traditional "rational basis" test in this case.

Plaintiff's class is made up of persons who have traveled but who retain their residence in the United States. All of the reporting and verification requirements of the Social Security Act remain intact and available whether or not a recipient or applicant decides to travel abroad.

Defendant contends that the multi-factor residence test [13] will not work when an individual is traveling outside the United States. The defendant Secretary asks what it proves regarding residency if someone still retains a dwelling in the United States; they could still be residing outside the United States. Defendant is painting an unrealistic picture. These benefits go to needy and disabled people; they are not the type of people who can maintain local residence for the sole purpose of receiving SSI benefits while actually living abroad.

Further, defendant already maintains a complete system for administering SS benefits in almost every country of the world. Social Security Claims Manual §§ 3608–3663. This system could apply to SSI. However, the need to contact recipients in foreign countries will not arise in most cases, since SSI recipients will

[13] See n. 8, *infra.*

report their travel plans to defendant before they leave the United States if they hope to continue to receive their checks while traveling. Only recipients abroad too long might warrant a foreign investigation.

Finally, defendant argues that the 30-day residency requirement provides a "stabilization period" for income and resources following a trip abroad. Once again, mere administrative convenience cannot justify the penalizing effect of section 1611(f). *Shapiro* v. *Thompson, supra; Memorial Hospital* v. *Maricopa County, supra.* The burden of proof remains on the recipient/applicant to establish eligibility and produce documentary evidence when required.[14]

The defendant's arguments presented for reconsideration are not persuasive.

VI. Relief

In further hearings held on April 11, 1977, concerning the nature of the order granting class relief, defendant Secretary contends that the judgment of this Court should not be applied retroactively for two reasons: (1) Under the traditional retroactivity test, there can only be prospective application; (2) Retroactivity is barred under sovereign immunity.

A. Retroactivity Under "Chevron Oil v. Huson"

Defendant asserts that based on the retroactivity criteria set forth in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), any remedy ordered by this Court

[14] Social Security Act § 1631(e)(1)(B); Claims Manual § 12107 (applicant/recipient must provide some evidence), § 12130 (claim denied if individual refuses to consent to outside contact); 42 U.S.C. § 1383(b)(c), 20 C.F.R. 416.538 and 416.558(a) (for determining, preventing (and recouping SSI overpayments).

should have prospective application only. He cites also to *Tatum* v. *Mathews,* 541 F. 2d 161 (6th Cir. 1976), and *Johnson* v. *Mathews,* 539 F. 2d 1111 (8th Cir. 1976), in support of his claim.

Defendant incorrectly argues that *Tatum* and *Johnson* preclude the requested class relief. Both cases were class actions challenging SSI statutes which terminated benefits without prior notice or hearing, and held that these statutes violated the Fifth Amendment. Although denying *automatic payment* of SSI benefits unconstitutionally terminated to the class, each Circuit applied its opinion retroactively to the class in two ways: (1) all class members were entitled to have their benefits reinstated until given a hearing on the termination facts (*Tatum* v. *Mathews, supra,* 541 F. 2d at 163); *Johnson* v. *Mathews, supra,* 539 F. 2d at 1114); and (2) all class members were entitled to receive all benefits withheld prior to the court decision if they proved successful at their hearings. *Johnson* v. *Mathews, supra,* 539 F. 2d at 1125, specifically states:

> * * * [T]he plaintiff and the members of the class can recover all of the benefits withheld should they prevail upon review of the initial determination of ineligibility. *See* 42 U.S.C. § 1383(b). The government concedes as much in its supplemental brief.

See also Tatum v. *Mathews, supra,* 541 F. 2d at 166 n. 5. Neither Circuit perceived any problem under *Chevron Oil;* indeed neither Circuit even mentioned that Supreme Court case.

Plaintiff's requested class relief seeks only the remedy provided by *Tatum* and *Johnson;* an opportunity to prove that class members did not in fact abandon their residences during their brief trips outside the country. Only those class members who did not *in fact* abandon their residences would be entitled to recover the SSI unconstitutionally withheld, just as in *Tatum* and *Johnson.*

The Supreme Court in *Chevron Oil* set forth the following:

> In our cases dealing with the non-retroactivity question, we have generally considered three separate factors. *First,* the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, (cites omitted), or by deciding an issue of first impression whose resolution was not clearly foreshadowed, (cites omitted). *Second,* it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." (Cites omitted.) *Finally,* we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' (Cites omitted.) 404 U.S. at 106–107. (Emphasis added.)

Jimenez v. *Weinberger, supra,* 523 F. 2d 689, is the only Social Security decision considering the *Chevron Oil* retroactivity factors, and *Jimenez* clearly supports the class relief requested here.[15] While the *Jimenez* court recognized the Supreme Court's decision in-

[15] The Seventh Circuit's decision in *Jimenez* directed a far more drastic remedy than plaintiffs request here: *automatic retroactive payments* to class members denied children's insurance benefits pursuant to the statute there ruled unconstitutional.

validating 42 U.S.C. § 416(h)(2)(A) (417 U.S. 638 (1975)) did establish a "new principle of law" under *Chevron Oil* factor (1), the *Jimenez* court held that *Chevron Oil* factors (2) and (3) mandated retroactive benefits to all class members. *Id.* at 703. The *Jimenez* analysis applies to the class relief requested here.

This Court agrees with defendant that a decision declaring section 1611(f) of the Social Security Act unconstitutional would establish a "new principle of law" not clearly foreshadowed by past decision. However, defendant Secretary fails under the second and third factors of *Chevron Oil*. The purposes behind the SSI program support the relief requested. As described in *Cardinale* v. *Mathews,* 399 F. Supp, 1163, 1164 (D.D.C. 1975),

> [t]he [SSI] program was designed to *provide positive assurance* that the nation's aged, blind, and disabled would *no longer have to subsist on below-poverty-level incomes.* (Citations omitted.) Congress recognized that aged, blind, and disabled individuals may be in need notwithstanding Social Security benefits, Veterans' Administration benefits, or even private pension benefits. SSI was intended to supplement those other sources of income *to free the poor from want and the indignities of poverty.* (Emphasis added.)

The needy have been unconstitutionally denied these benefits. The denial of these benefits necessarily required the plaintiff class members to consume other assets in order to attempt to maintain their standard of living, while at the same time exercise their right to travel. These people are still needy, maybe even more so for having taken their trips abroad, and so surely the retroactive payment of such benefits furthers,

rather than impedes, the effectuation of the purposes of the SSI program.[16]

As with Title II, Title XVI [SSI] contains a statute permitting retroactive recovery of wrongfully denied SSI benefits, 42 U.S.C. § 1383(b). That statute authorizes recovery of underpayments; there is no requirement that such denials have been willful; any mistaken denial will give rise to such recovery. *See Jimenez* v. *Weinberger, supra,* 523 F. 2d at 703–704 (relying on parallel provisions in Title II of Social Security Act, 42 U.S.C. § 404). Thus, like Title II recipients, Congress intended that Title XVI beneficiaries "receive the full and correct amount of their entitlement, even if this requires payments to be made long after the period of entitlements." *Id.,* 523 F. 2d at 703.

Turning to the third factor of the *Chevron Oil* case, this Court finds that the requested class relief will not produce "substantial inequitable results." On the one hand, substantial equities favor affording plaintiffs the opportunity of proving that defendant unconstitutionally and incorrectly denied their SSI benefits. On the other, there is defendant's apparent concession that the requested class relief will not "necessitate a reduction in the scope of persons benefitted by [the SSI program]." *Jimenez* v. *Weinberger, supra,* 523 F. 2d at 704. Instead, defendant only makes an assertion

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[16] This is premised on the idea that past benefits owed should go to those who are still *presently needy*. Those *no longer needy*, even if they were needy at the time they took their trip, would not need the past benefits to meet their *current* needs as envisioned under the goals of the program. This will be explored more fully in defining the scope and method of relief available to plaintiff's class.

that "[t]he administrative burden involved would outweigh any benefits which would result" from the requested class relief. [Def. Brief Class Relief at 6, lines 12–13.] Decisions within the Ninth Circuit reject this assertion as a basis for denying class relief. *Jen Cuk* v. *Brain,* 355 F. Supp. 134, 136 (N.D. Cal. 1972). If courts denied retroactive relief because of increased administrative costs alone, the government would never be compelled to repay benefits to which recipients were later found entitled.

For all these reasons, the requested class relief is not barred by any principle against retroactivity of judicial decisions.

B. RETROACTIVITY AND SOVEREIGN IMMUNITY

It is settled law that the United States, as sovereign, "is immune from suit save as it consents to be sued * * *" *United States* v. *Sherwood,* 312 U.S. 584, 586 (1941). In *United States* v. *Testan,* 424 U.S. 392 (1976), two government attorneys sought job reclassifications under the Classification Act. The Supreme Court held that any award of back pay was barred by sovereign immunity. The Court noted that the Tucker Act, 28 U.S.C. § 1491, which was the basis for jurisdiction, did "not create any substantive right enforceable against the United States for money damages." *Id.* at 398.

Based on the *Testan* case, the two circuit courts in *Johnson, supra,* (8th Cir.) and *Tatum, supra,* (6th Cir.) held:

> As with the Tucker Act, § 405(g) [the jurisdictional statute in the instant case] is only jurisdictional in nature and *cannot itself constitute a waiver of sovereign immunity or* confer the requisite substantive right. Such a waiver and right must be found, if at all, in the statutes creating the SSI program. 539 F. 2d at 1123.

Both *Johnson* and *Tatum* found that Title XVI [SSI] created no substantive right to receive SSI benefits, and thus the plaintiffs' class could not receive retroactive payments. Defendant contends the same should apply here.

This Court need not go into all of the arguments raised by the plaintiff, because this Court, as will be discussed further in the following section of this opinion, grants the plaintiff class the same remedy that the courts in *Johnson* and *Tatum* found appropriate. In *Johnson* and *Tatum,* the circuit courts held that under the facts of those cases, the determination of benefits without a noticed hearing regarding the class members eligibility was unconstitutional. The Secretary was enjoined from denying payments to the plaintiff class from the time of the courts' judgment until the noticed hearing could be held. However, because the courts had held that sovereign immunity barred retroactivity, the plaintiff class was denied automatic back payments for the time from initial cut off of payments until the courts' judgments.

The circuit courts noted that there would be no permanent harm, because if the plaintiff class member showed he was eligible at the noticed hearing then he could recover *all* of the benefits withheld, citing to 42 U.S.C. § 1383(b). *Johnson* v. *Mathews, supra,* 539 F. 2d at 1125.

The same reasoning applies in the instant case. Only those still needy will be effected by this Court's judgment (see following section of opinion). This Court

will be ordering that the decisions denying benefits in the past, based solely on § 1611(f), are void and that the plaintiff class has the right to seek a hearing to show that they were in fact still residents of the United States during the period they were out of the country. If they can make such a showing at the hearing then they can recover retroactive payments for the time they were out of the country, pursuant to 42 U.S.C. § 1383(b). This remedy will satisfy the fears of the defendant Secretary and meets the concerns expressed in *Testan, supra, Johnson, supra* and *Tatum, supra.*

For all these reasons, the contentions of the defendant regarding retroactivity as it relates to sovereign immunity in the factual situation presented here are denied.

C. SCOPE AND METHOD OF RELIEF

Retirement benefits under the Social Security Act are based on the amount of payments made into the Social Security fund by the individual employee and his employer. On the other hand, SSI benefits are based on need. "The [SSI] program was designed to provide positive assurance that the nation's aged, blind, and disabled would no longer have to subsist on below-poverty-level incomes." *Cardinale* v. *Mathews supra,* 339 F. Supp. at 1164.

As was clearly stated in *Rothstein* v. *Wyman,* 467 F. 2d 226, 235 (2nd Cir. 1972), *cert. denied* 411 U.S. 921 (1972):

> * * * Federal standards are designed to ensure that those needs [of impoverished persons] are equitably met; and there may perhaps be cases in which the prompt payment of funds wrongfully withheld will serve that end. As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear.

The purpose of the SSI program is to help those who are *currently* needy. It follows that where there is no need, the goals of the program would not be effectuated by the payment of SSI benefits. Therefore, not all previous recipients of SSI benefits who were denied payments, solely because of § 1611(f) should now receive those lost benefits. The retroactive payments should go to *only* those who were unconstitutionally denied benefits in the past, but who are still *currently needy,* and thus still eligible for SSI benefits. If a person is not presently needy, then there would be no purpose served by granting him retroactive benefits. In such a situation it would appear that the payments would "become compensatory rather than remedial."

The Order to follow this Opinion will limit relief to those members of the certified class who are receiving SSI benefits on the date the Order is entered and to those class members who would be receiving SSI benefits on the date of the entered Order, but for current operation of section 1611(f), 42 U.S.C. § 1382(f).

The plaintiff seeks also to have included all those class members who *could be* eligible to receive SSI benefits on the date the Order is entered, but who had their SSI denied, suspended, interrupted, or terminated pursuant to section 1611(f) and regulations promulgated thereunder during the class period, and *do not have an active application* for SSI on file with defendant. However, it is not evident that these persons fall within the group of persons that the SSI program was designed to benefit. It is of course pos-

sible that many of these persons are indeed needy, but without an active application by them with the Social Security Administration, it would be mere speculation as to their economic status. It would impose a completely unrealistic and undue burden on the defendant to expect him to determine who these persons might be.

The parties agree that residency in the United States is a valid prerequisite to receipt of SSI benefits.[17] The burden is on the recipient/applicant to establish his or her eligibility and produce documentary evidence where required.[18] Consequently when a SSI recipient does depart the United States for more than one month, it would be necessary for the recipient to prove that he or she was still in fact a United States resident during the time he or she was out of the United States. This can properly be accomplished by allowing all class members, previously defined, who have had their benefits denied, suspended, interrupted or terminated under § 1611(f), to have their eligibility for SSI redetermined, without regard to that statute or accompanying regulations. Defendant Secretary will be ordered to prepare and file with this Court a notice informing the class members of this Court's decision and of the opportunity for a redetermination of their denials, suspensions, interruptions or terminations of SSI as a result of § 1611(f).

It is an uncontested fact that plaintiff Aznavorian was a resident during the months of August and September 1974 and therefore she is entitled to receive SSI benefits denied her for those months. Defendant

[17] See n. 7, *infra*.

[18] See n. 13, *infra*.

will be directed to pay those benefits denied to Grace Aznavorian for those particular months.

An Order will immediately follow, incorporating the conclusions contained in this Opinion.

Dated: August 10, 1977.

GORDON THOMPSON, Jr.,
Judge, United States District Court.

Copies to: Victor Harris, Esq., Legal Aid Society, 964 Fifth Avenue, San Diego, CA 92101; Ian Fan, Esq., Peter Schey, Esq., Legal Aid Society, 1760 Euclid Avenue, San Diego, CA 92105; Charles Wolfinger, Esq., Legal Aid Society, 305 Center Street, Chula Vista, CA 92010; Michael Waltz, Esq., Assistant U.S. Attorney.

APPENDIX B

United States District Court, Southern District of California

Civil No. 75–1103–GT

GRACE AZNAVORIAN, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, Jr., ETC., DEFENDANT

[filed August 23, 1977]

ORDER

Consistent with this Court's Opinion filed herewith, and the Court having determined (1) that the class defined below meets the requirements of Federal Rule 23 (a) and (b)(2), and (2) that there is no genuine issue as to any material fact regarding plaintiff Grace Aznavorian's eligibility for Supplemental Security Income (SSI) during August and September 1974, this Court hereby (1) grants the motion for class certification on behalf of the class defined below, (2) grants plaintiffs summary judgment, and (3) grants individual and class relief pursuant to the provisions in this Order because such provisions are necessary to afford all plaintiffs the full legal and equitable relief to which they are entitled.

It is hereby ordered, That:

1. This suit is certified as a class action under 42 U.S.C. §§ 405(g), 1383(c)(3) and Federal Rule 23 (a) and (b)(2) on behalf of the following class:

> All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals Council review, based solely on 42 U.S.C. § 1382(f) and regulations promulgated thereunder, from September 26, 1975 until the entry of this Order.

2. 42 U.S.C. § 1382(f) and regulations promulgated thereunder are declared in violation of the due process clause of the Fifth Amendment to the United States Constitution and therefore invalid insofar as they cause defendant to suspend, interrupt, terminate, or deny SSI to otherwise eligible individuals solely because they travel outside the United States for one calendar month or thirty (30) consecutive days. Accordingly, 42 U.S.C. § 1382(f) and regulations promulgated thereunder are hereby declared null and void in their entirety.

3. Defendant's decision of September 26, 1975 affirming the suspension of plaintiff Aznavorian's SSI benefits for August and September 1974, pursuant to 42 U.S.C. § 1382(f) and regulations promulgated thereunder, is hereby reversed. Plaintiff Aznavorian is entitled to receive the SSI benefits denied her for August and September 1974. Therefore, defendant, his agents, employees and successors are hereby ordered to pay said benefits to plaintiff Aznavorian, within sixty (60) days of this Order's entry.

4. By reason of 42 U.S.C. § 1382(f) and regulations promulgated thereunder being declared invalid, null and void for violating the due process clause of the Fifth Amendment to the United States Constitution, the denials, suspensions, interruptions, and terminations of SSI pursuant to said statute and regulations are hereby reversed and declared null and void for all the following members of the certified class:

> (a) All those class members who *are* receiving SSI benefits on the date this Order is entered;

(b) All those class members who *would be* receiving SSI benefits on the date this Order is entered, but for current operation of Section 1382(f) and regulations promulgated thereunder.

5. All class members identified above in paragraph 4 are entitled to have defendant, his agents, employees and successors redetermine their eligibility for SSI during the time period such benefits were denied, suspended, interrupted or terminated under Section 1382(f) and accompanying regulations, without regard to such statute or regulations, and according to the principles set forth in the Opinion. All such class members who *in fact* were United States residents during such time periods are entitled to receive all SSI benefits withheld under Section 1382(f) and regulations promulgated thereunder.

6. Defendant, his agents, employees and successors are ordered to prepare and file with this Court a notice informing all class members identified above in paragraph 4 of the following:

(a) that this Court has declared Section 1382(f) and regulations promulgated thereunder invalid, null and void under the Fifth Amendment to the United States Constitution;

(b) that this Court has reversed all such class members' denials, suspensions, interruptions and terminations of SSI pursuant to Section 1382(f) and regulations promulgated thereunder, and declared such decisions null and void;

(c) that all such class members, within six (6) months after receiving the notice set forth in this paragraph, are entitled to request defendant, his agents, employees and successors for a redetermination of their denials, suspensions, interruptions or terminations of SSI, without regard to Section 1382(f) or any regulations promulgated thereunder, and pursuant to standards consistent with this Court's Opinion (which shall be stated in the notice);

(d) that all such class members are entitled to all administrative and judicial review of any adverse redeterminations, which would otherwise be available on adverse initial determinations; and

(e) that all such class members, who, on the basis of the proceedings in (c) and (d), are determined to have been United States residents *in fact* during the disqualification period caused by Section 1382(f), and regulations promulgated thereunder, are entitled to receive such SSI benefits.

Defendant, his agents, employees and successors shall file a copy of such proposed notice with the Court and serve a copy on plaintiffs' counsel within thirty (30) days of the date this Order is entered. If plaintiffs' counsel has any objections to defendant's proposed notice, such objections shall be filed with the Court and served on counsel for defendant within thirty (30) days after service of the proposed notice on plaintiffs' counsel. The Court will then approve a notice form, and defendant shall mail it within thirty (30) days to all persons who received SSI benefits at any time from September 26, 1975 to the date this Order is entered.

7. Defendant, his agents, employees and successors are ordered to pay the SSI benefits originally denied pursuant to Section 1382(f), and regulations promulgated thereunder, to all those class members iden-

tified above in paragraph 6(e) within sixty (60) days of a favorable decision in the proceedings set forth in paragraph 6 (c), (d).

8. Defendant, his agents, employees and successors are further ordered to file an affidavit with this Court and serve a copy on plaintiffs' counsel, attesting to timely mailing of the notice defined above in paragraph 6.

9. This Court retains jurisdiction of this cause until all relief herein has been effectuated, and may, if necessary, require defendant, his agents, employees and successors to file reports describing their progress in effectuating said relief.

10. This Court finds no just reason for delaying the enforcement of this Order.

Dated August 19, 1977.

GORDON THOMPSON, Jr.,
Judge, United States District Court.

Copies to: Victor Harris, Esq., Legal Aid Society, 964 Fifth Avenue, San Diego, CA 92101; Charles Wolfinger, Esq., Legal Aid Society, 305 Center Street, Chula Vista, CA 92010; Ian Fan, Esq., Peter Schey, Esq., Legal Aid Society, 1760 Euclid Avenue, San Diego, CA 92105; Michael Waltz, Esq., Assistant U.S. Attorney.

APPENDIX C

United States District Court, Southern District of California

Civil No. 75-1103-GT

GRACE AZNAVORIAN, ET AL., PLAINTIFFS
v.
JOSEPH A. CALIFANO, JR., ETC., DEFENDANT

[filed September 6, 1977]

JUDGMENT PURSUANT TO
RULE 58, FEDERAL RULES OF CIVIL PROCEDURE

This matter came on for hearing before this court, the Honorable Gordon Thompson, Jr., District Judge, presiding, and an Opinion (filed August 12, 1977) and Order (filed August 23, 1977) having been rendered.

It is adjudged, That:

1. The motion for class certification on behalf of the class as defined in the Order, filed August 23, 1977, is granted;

2. Summary Judgment is granted to plaintiffs;

3. individual and class relief are granted pursuant to the provisions in the Order, filed August 23, 1977;

4. and each party shall bear his or her own costs.

Dated: August 31, 1977.

GORDON THOMPSON, Jr.,
Judge, United States District Court.

Copies to: Victor Harris, Esq., Legal Aid Society, 964 Fifth Avenue, San Diego, CA 92101; Charles Wol-

finger, Esq., Legal Aid Society, 305 Center Street, Chula Vista, CA 92010; Peter Schey, Esq., Ian Fan, Esq., Legal Aid Society, 1760 Euclid Avenue, San Diego, CA 92105; Michael Waltz, Esq., Assistant U.S. Attorney.

APPENDIX D

United States District Court, Southern District of California

Civil No. 75-1103-GT

GRACE AZNAVORIAN, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., ETC., DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252, from the order of the District Court entered in this action on August 23, 1977, and from the judgment of the District Court entered on September 6, 1977.

Dated: September 22, 1977.

TERRY J. KNOEPP,
United States Attorney.
D. MICHAEL WALTZ,
Assistant U.S. Attorney.
Attorneys for Defendant.

U.S. GOVERNMENT PRINTING OFFICE: 1977